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# **Domestic Security Committee**

**Wednesday, March 15, 2006  
3:30 P.M. – 5:00 P.M.  
12 House Office Building**

**Rep. Sandy Adams  
Chair**

# **Committee Meeting Notice**

## **HOUSE OF REPRESENTATIVES**

**Speaker Allan G. Bense**

### **Domestic Security Committee**

**Start Date and Time:** Wednesday, March 15, 2006 03:30 pm

**End Date and Time:** Wednesday, March 15, 2006 05:00 pm

**Location:** 12 HOB

**Duration:** 1.50 hrs

#### **Consideration of the following bill(s):**

HB 285 Emergency Management by Needelman

HB 7023 Review under the Open Government Sunset Review Act regarding Medical Facility Terrorism Response Information by Governmental Operations Committee

HB 7025 Review under the Open Government Sunset Review Act regarding Comprehensive Emergency Management Plan Components by Governmental Operations Committee

HB 7033 Review under the Open Government Sunset Review Act regarding Security System Plans by Governmental Operations Committee

**NOTICE FINALIZED on 03/13/2006 16:19 by LOVE.JOHN**


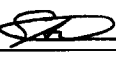


## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 285 Emergency Management

**SPONSOR(S):** Needelman and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 568, SB 590

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Domestic Security Committee</u>		Newton 	Newton 
2) <u>Judiciary Committee</u>			
3) <u>State Administration Council</u>			
4) _____			
5) _____			

### SUMMARY ANALYSIS

The bill amends s. 252.36, F.S., to provide that lawfully possessed weapons cannot be confiscated in a state of emergency. Section 252.36(5)(h), F.S., suspends or limits the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of emergency, but does not provide for the confiscation of lawfully possessed weapons.

The bill amends s. 870.044, F.S., to provide that firearms that are lawfully possessed may not be confiscated by public officials from law-abiding citizens in a state of emergency. Section 870.44, F.S., provides that when a state of emergency is declared that weapons and ammunition shall not be sold or displayed. The section further provides that only authorized law enforcement officials or persons in military service acting in the official performance of their duties may display or have firearms in their possession.

This bill does not appear to have a fiscal impact on state and local governments.

The bill takes effect July 1, 2006.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provides for Limited Government:** - The bill maintains the right of Floridians to legally keep and bear arms under Article I Section 8 of the Florida Constitution. No expanded restrictions or limitations are implied under the bill.

**Safeguards Individual liberty** - The purpose of this bill is to amend s. 252.36, F.S., and s. 870.044, F.S., to state that firearms that are lawfully possessed may not be confiscated in times of declared emergency reaffirming Florida citizen's right to legally bear arms.

**Maintain Public Security** - The bill may adversely impact on the ability of law enforcement agencies to protect public safety and security. By limiting the ability of law enforcement to be flexible in their responses to emergency conditions, the safety and security of the public may be degraded under certain conditions.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

The Constitution of the United States and Florida both guarantee citizens the right to keep and bear arms. This right has been reaffirmed by the decisions of the courts to varying degrees over the course of history. However, some limitations to this right exist in regard to convicted felons and limits placed on the sale and ownership of certain prohibited weapons. Currently, there are no prohibitions delineated in statute that prohibit the taking of legally owned weapons.

In New Orleans, following Hurricane Katrina a number of legally owned weapons were confiscated by law enforcement agencies. This practice was halted when concerns were voiced over these actions and a lawsuit was filed by the National Rifle Association.<sup>1</sup> Eight states including Louisiana have since filed legislation to address this issue in detail.

##### Effects of the Bill

The bill amends s. 252.36 (5)(h), F.S., and s. 870.44, F.S., detailing emergency powers of the Governor and public officials by prohibiting the seizure, taking or confiscation of legally owned firearms. The amended language does not affect the current prohibition on sales and display of firearms in a declared state of emergency, nor does it effect the carrying of firearms by on duty law enforcement or military personnel in performance of their duties.

#### SECTION DIRECTORY:

**Section 1.** Amends s. 252.36, F.S., to provide that lawfully possessed weapons may not be seized or confiscated.

**Section 2.** Amends s. 870.044, F.S., to provide that lawfully possessed firearms may not be seized or confiscated.

**Section 3.** Re-enacts s. 870.44, F.S., which outlines the authority of the governor to impose energy restrictions when energy shortages are anticipated and to carry out the state's energy emergency contingency plan.

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<sup>1</sup> <http://www.nraila.org>

**Section 4.** Provides an effective date of July 1, 2006.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

This bill does not appear to have a fiscal impact on state or local governments.

1. Revenues: N.A.

2. Expenditures: N.A.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues: N.A.

2. Expenditures: N.A.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: N.A.**

### **D. FISCAL COMMENTS:**

This bill does not appear to have a fiscal impact.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

See Below.

#### **2 Other:**

The bill raises constitutional concerns under both the United States and Florida Constitutions. A number of questions regarding the right to keep arms and the emergency powers of the State and local governments remain. The ability to remove legally owned firearms from private citizens for the protection of the common good is open to argument. The State Constitution prohibits any infringement on the right to keep and bear arms while providing for its regulation in the manner by which the State shall chose. A tension is drawn under the structure of this bill regarding the right to keep arms and that of the State to regulate the keeping of firearms. An argument has been advanced in the Courts that the right to keep and bear arms is a collective rather than an individual right. In United States v. Miller 307 US 174 (1939), the court has implied the rights contained in the Second Amendment of the United States Constitution are only limits on the powers of the federal government and not on the powers of the states. In four Florida cases; State of Florida v. Astore,

Fla., 258 So.2d 33 (Fla. 2<sup>nd</sup> DCA 1972), Nelson v. State, 195 So.2d 853 (Fla.1967), Davis v. State, 146 So.2d 892 (Fla.1962) and Carlton v. State, 63 Fla. 1, 58 So. 486 (Fla.1912), the courts held that the right to bear arms is not an absolute and the state through a legislative process may enact valid police regulations to promote the safety of the general public. Applying the above reasoning, the bill would have applicability to the execution of emergency powers and may create a potential conflict with Article IV Section 1, Florida Constitution and the emergency powers of the Governor contained in Florida statutes.

The Governor may issue executive orders, proclamations, and rules and may amend or rescind them as necessary. These executive orders, proclamations have the same force and effect of law during the declared emergency.<sup>2</sup> This then brings into question the emergency power of the Governor to temporarily suspend rights as granted under the Constitution. Precedent exists for such an action in that the declaring of martial law has been upheld for the limiting of personal liberties in times of emergency.<sup>3</sup> Although the Courts tend to see the declaration of martial law as a last resort, they have upheld a Governor's power as granted by the State Constitution in Article 4, section 1(d).

Two recent cases have applied the opposite precedent, that the right to keep and bear arms is an individual right rather than a collective right. In United States v. Verdugo-Urquidez, 110 S. Ct. 3039 (1990), the court held that the term "the people" in the Second Amendment of the United States Constitution had the same meaning as in the Preamble, First, Four and Ninth Amendments. Although this case was a Fourth Amendment case it has applicability to this issue. In Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989), aff'd, 894 F.2d 412 (11<sup>th</sup> Cir. 1990), the court held that the right to keep and bear arms was guaranteed to all Americans.<sup>4</sup>

The bill highlights the question of the rights of the individual verses that of the State to exercise limitations on such rights in protecting the welfare and security of the public at large. It should be anticipated, if the bill is enacted, that it could be subject to legal scrutiny well beyond the depth of this analysis.

#### B. RULE-MAKING AUTHORITY:

No additional grant of rulemaking authority is required to implement the provisions of this bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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<sup>2</sup> S. 252.36 (1)(a) and (5)(a) F.S.

<sup>3</sup> <http://www.answers.com>

<sup>4</sup> <http://www.firearmsandliberty.com>

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A bill to be entitled

An act relating to emergency management; amending s. 252.36, F.S.; providing construction with respect to the authority of the Governor to seize, take, or confiscate firearms in the event of an emergency beyond local control; amending s. 870.044, F.S.; providing construction with respect to the seizure, taking, or confiscation of firearms during a state of emergency; reenacting s. 377.703(3)(a), F.S., relating to the authority of the Governor to utilize specified emergency management powers to carry out emergency actions required by a serious shortage of energy sources under the energy emergency contingency plan of the Department of Environmental Protection, for the purpose of incorporating the amendment to s. 252.36, F.S., in a reference thereto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (h) of subsection (5) of section 252.36, Florida Statutes, is amended to read:

252.36 Emergency management powers of the Governor.--

(5) In addition to any other powers conferred upon the Governor by law, she or he may:

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. However, nothing contained in ss. 252.31-252.90

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shall be construed to authorize the seizure, taking, or  
confiscation of firearms that are lawfully possessed.

Section 2. Section 870.044, Florida Statutes, is amended  
to read:

870.044 Automatic emergency measures.--Whenever the public  
official declares that a state of emergency exists, pursuant to  
s. 870.043, the following acts shall be prohibited during the  
period of said emergency throughout the jurisdiction:

(1) The sale of, or offer to sell, with or without  
consideration, any ammunition or gun or other firearm of any  
size or description.

(2) The intentional display, after the emergency is  
declared, by or in any store or shop of any ammunition or gun or  
other firearm of any size or description.

(3) The intentional possession in a public place of a  
firearm by any person, except a duly authorized law enforcement  
official or person in military service acting in the official  
performance of her or his duty.

Nothing contained in this chapter shall be construed to  
authorize the seizure, taking, or confiscation of firearms that  
are lawfully possessed.

Section 3. For the purpose of incorporating the amendment  
made by this act to section 252.36, Florida Statutes, in a  
reference thereto, paragraph (a) of subsection (3) of section  
377.703, Florida Statutes, is reenacted to read:

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377.703 Additional functions of the Department of Environmental Protection; energy emergency contingency plan; federal and state conservation programs.--

(3) DEPARTMENT OF ENVIRONMENTAL PROTECTION; DUTIES.--The Department of Environmental Protection shall, in addition to assuming the duties and responsibilities provided by ss. 20.255 and 377.701, perform the following functions consistent with the development of a state energy policy:

(a) The department shall assume the responsibility for development of an energy emergency contingency plan to respond to serious shortages of primary and secondary energy sources. Upon a finding by the Governor, implementation of any emergency program shall be upon order of the Governor that a particular kind or type of fuel is, or that the occurrence of an event which is reasonably expected within 30 days will make the fuel, in short supply. The department shall then respond by instituting the appropriate measures of the contingency plan to meet the given emergency or energy shortage. The Governor may utilize the provisions of s. 252.36(5) to carry out any emergency actions required by a serious shortage of energy sources.



Section 4. This act shall take effect upon becoming a law.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7033      PCB GO 06-05      OGSR Security System Plans  
**SPONSOR(S):** Governmental Operations Committee  
**TIED BILLS:** None      **IDEN./SIM. BILLS:** SB 696

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Brazzell/Williamson	Williamson
1) Domestic Security Committee		Newton 	Newton 
2) State Administration Council			
3) _____			
4) _____			
5) _____			

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### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact an exemption, it automatically repeals on October 2<sup>nd</sup> of the fifth year after enactment.

The bill reenacts the public records and public meetings exemptions regarding security system plans held by an agency for property owned by or leased to the state or its political subdivisions and for privately owned or leased property. The exemptions will repeal on October 2, 2006, if this bill does not become law.

This bill may have a minimal non-recurring positive fiscal impact on state and local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

Section 119.071(3)(a), F.S., provides a public records exemption and s. 286.0113, F.S., provides a related public meetings exemption designed to protect security system plans for property owned by or leased to the state or its political subdivisions and for privately owned or leased property. These provisions were enacted during the 2001 C special session following the September 11, 2001, attacks on the United States.

Section 119.071(3)(a), F.S., makes confidential and exempt<sup>1</sup> such security system plan or portion thereof held by an agency. "Security system plan" includes

[A]ll records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems; threat assessments conducted by any agency or any private entity; threat response plans; emergency evacuation plans; sheltering arrangements; or manuals for security personnel, emergency equipment, or security training.<sup>2</sup>

Section 286.0113, F.S., provides a public meetings exemption for meetings in which confidential and exempt security system plans or portions thereof would be revealed.

Pursuant to the Open Government Sunset Review Act,<sup>3</sup> the exemptions will repeal on October 2, 2006, unless reenacted by the Legislature.

##### **Effect of Bill**

The bill removes the repeal dates, thereby reenacting the public records and public meetings exemptions. It also reorganizes the provisions by relocating the description of a "security system plan" to the beginning of the exemption.

The bill removes the provision requiring an agency with authorized access to such plan to maintain the confidential and exempt status of that plan. In *Ragsdale v. State*,<sup>4</sup> the Supreme Court held that

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the

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<sup>1</sup> There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>2</sup> Section 119.071(3)(a), F.S.

<sup>3</sup> Section 119.15, F.S.

<sup>4</sup> 720 So.2d 203 (Fla. 1998).

policy behind the exemption and not on the simple fact that the information has changed agency hands.<sup>5</sup>

In *City of Riviera Beach v. Barfield*,<sup>6</sup> the court stated “[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.”<sup>7</sup> As such, the provision is unnecessary and has been removed, because had the Legislature intended for the exempt status to evaporate then the Legislature would have stated as much.

Finally, the bill makes editorial changes.

**C. SECTION DIRECTORY:**

Section 1 amends s. 119.071(3)(a), F.S., to remove the repeal date.

Section 2 amends s. 286.0113, F.S., to remove the repeal date.

Section 3 provides an effective date of October 1, 2006.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

None. This bill does not create, modify, amend, or eliminate a state revenue source.

**2. Expenditures:**

See FISCAL COMMENTS.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None. This bill does not create, modify, amend, or eliminate a local revenue source.

**2. Expenditures:**

See FISCAL COMMENTS.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill may represent a minimal non-recurring positive impact on state and local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment as a result of training employees responsible for replying to

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<sup>5</sup> *Id.* at 206, 207.

<sup>6</sup> 642 So. 2d 1135 (Fla. 4<sup>th</sup> DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

<sup>7</sup> *Id.* at 1137.

public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state and local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

##### **Open Government Sunset Review Act**

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None.

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A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding security system plans; amending s. 119.071, F.S., which provides an exemption from public records requirements for security system plans for any property owned by or leased to the state or any of its political subdivisions and any privately owned or leased property; reorganizing provisions, making editorial changes, and removing superfluous language; removing the scheduled repeal of the exemption under the Open Government Sunset Review Act; amending s. 286.0113, F.S., which provides an exemption from public meetings requirements for a meeting that would reveal a security system plan or portion thereof; making editorial changes; removing the scheduled repeal of the exemption under the Open Government Sunset Review Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (3) of section 119.071, Florida Statutes, is amended to read:

119.071 General exemptions from inspection or copying of public records.--

(3) SECURITY.--

(a)1. As used in this paragraph, the term "security system plan" includes all:

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a. Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems;

b. Threat assessments conducted by any agency or any private entity;

c. Threat response plans;

d. Emergency evacuation plans;

e. Sheltering arrangements; or

f. Manuals for security personnel, emergency equipment, or security training.

2. A security system plan or portion thereof for:

a.1- Any property owned by or leased to the state or any of its political subdivisions; or

b.2- Any privately owned or leased property

~~which plan or portion thereof is held by an any agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. As used in this paragraph, the term a "security system plan" includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems; threat assessments conducted by any agency or any private entity; threat response plans; emergency evacuation plans; sheltering arrangements; or manuals for security personnel, emergency equipment, or security training.~~

This exemption is remedial in nature and it is the intent of the

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Legislature that this exemption apply ~~be applied~~ to security system plans held by an agency before, on, or after the effective date of this paragraph.

3. Information made confidential and exempt by this paragraph may be disclosed by the custodian of public records ~~custodial agency~~ to:

a. The property owner or leaseholder; or

b. ~~Such information may be disclosed by the custodial agency to~~ Another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those persons who are responsible for such attempts or acts, ~~and the confidential and exempt status of such information shall be retained while in the possession of the receiving agency. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. Section 286.0113, Florida Statutes, is amended to read:

286.0113 General exemptions from public meetings.--That ~~portion These portions~~ of a any meeting that ~~which~~ would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(3)(a) is ~~are~~ exempt from the provisions of s. 286.011 and s. 24(b), Art. I of the State Constitution. ~~This section is subject to the Open Government Sunset Review Act, in accordance with s. 119.15, and shall stand repealed on October~~

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83 | ~~2, 2006, unless reviewed and saved from repeal through~~  
84 | ~~reenactment by the Legislature.~~

85 |       Section 3. This act shall take effect October 1, 2006.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 7025      PCB GO 06-12    OGSR Comprehensive Emergency Management Plans  
**SPONSOR(S):** Governmental Operations Committee, Rivera  
**TIED BILLS:**                                 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Brazzell/Williamson	Williamson
1) Domestic Security Committee		Newton <i>AK</i>	Newton <i>AK</i>
2) State Administration Council			
3)			
4)			
5)			

## SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact an exemption, it automatically repeals on October 2<sup>nd</sup> of the fifth year after enactment.

The bill reenacts the public records exemptions provided for portions of a comprehensive emergency management plan addressing a public or private hospital's response to an act of terrorism. It also reenacts the public meetings exemption for those portions of meetings wherein such confidential and exempt plan is discussed. The exemptions will repeal on October 2, 2006, if this bill does not become law.

The bill appears to have a minimal non-recurring positive fiscal impact on state and local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

Section 395.1056, F.S., provides public records and public meetings exemptions regarding emergency management plans. The exemptions were enacted during the 2001 C special session following the September 11, 2001, attacks on the United States.

##### Public Records Exemptions

Portions of a comprehensive emergency management plan that address a public or private hospital's response to an act of terrorism, held by the Agency for Health Care Administration, a state or local law enforcement agency, a local government emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs, is confidential and exempt<sup>1</sup> from public records requirements.<sup>2</sup> Portions of a comprehensive emergency management plan that address a public hospital's response to an act of terrorism held by that public hospital is confidential and exempt from public disclosure.<sup>3</sup>

Portions of an emergency management plan that address a hospital's response to terrorism include

[S]ecurity systems or plans; vulnerability analyses; emergency evacuation transportation; sheltering arrangements; postdisaster activities, including provisions for emergency power, communications, food, and water; postdisaster transportation; supplies, including drug caches; staffing; emergency equipment; and individual identification of residents, transfer of records, and methods of responding to family inquiries.<sup>4</sup>

The exemptions do not apply to the Governor's certification of sufficiency of a comprehensive emergency management plan addressing a hospital's response to an act of terrorism.<sup>5</sup>

##### Public Meetings Exemption

Any portion of a public meeting that would reveal confidential and exempt emergency management plans is exempt from public meetings requirements.<sup>6</sup>

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<sup>1</sup> There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>2</sup> Section 395.1056(1), F.S.

<sup>3</sup> Section 395.1056(2), F.S.

<sup>4</sup> Section 395.1056(1) and (2), F.S.

<sup>5</sup> Section 395.1056(4), F.S.

<sup>6</sup> Section 395.1056(3), F.S.

## Open Government Sunset Review Act

Pursuant to the Open Government Sunset Review Act,<sup>7</sup> the exemptions will repeal on October 2, 2006, unless reenacted by the Legislature.

### **Effect of Bill**

The bill removes the repeal dates, thereby reenacting the public records and public meetings exemptions. It reorganizes the section and makes editorial changes.

The bill removes the provision requiring an agency with authorized access to such plan to maintain the confidential and exempt status of that plan. In *Ragsdale v. State*,<sup>8</sup> the Supreme Court held that

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.<sup>9</sup>

In *City of Riviera Beach v. Barfield*,<sup>10</sup> the court stated “[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.”<sup>11</sup> As such, the provision is unnecessary and has been removed, because had the Legislature intended for the exempt status to evaporate then the Legislature would have stated as much.

### **C. SECTION DIRECTORY:**

Section 1 amends s. 395.1056, F.S., to remove the repeal dates.

Section 2 provides an effective date of October 1, 2006.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None. This bill does not create, modify, amend, or eliminate a state revenue source.

#### **2. Expenditures:**

See FISCAL COMMENTS.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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<sup>7</sup> Section 119.15, F.S.

<sup>8</sup> 720 So.2d 203 (Fla. 1998).

<sup>9</sup> *Id.* at 206, 207.

<sup>10</sup> 642 So. 2d 1135 (Fla. 4<sup>th</sup> DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

<sup>11</sup> *Id.* at 1137.

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may represent a minimal non-recurring positive impact on state and local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment as a result of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the public records exemption, state and local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**Open Government Sunset Review Act**

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None.

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A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding comprehensive emergency management plan components; amending s. 395.1056, F.S., which provides an exemption from public records requirements for those portions of a comprehensive emergency management plan that address the response of a public or private hospital to an act of terrorism and which provides an exemption from public meetings requirements for that portion of a public meeting which would reveal information contained in a comprehensive emergency management plan that addresses the response of a hospital to an act of terrorism; reorganizing provisions, making editorial changes, and removing superfluous language; removing the scheduled repeal of the exemptions under the Open Government Sunset Review Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 395.1056, Florida Statutes, is amended to read:

395.1056 Plan components addressing a hospital's response to terrorism; public records exemption; public meetings exemption.--

(1) (a) Those portions of a comprehensive emergency management plan that ~~which~~ address the response of a public or private hospital to an act of terrorism as defined by s. 775.30

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and ~~which are held by~~ filed with or are in the possession of the agency, a state or local law enforcement agency, a county or municipal emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs are confidential and exempt from ~~the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption is remedial in nature, and it is the intent of the Legislature that this exemption be applied to plans filed with the agency before, on, or after the effective date of this section.~~

(b) Information made confidential and exempt by this subsection may be disclosed by a custodial agency to another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those persons who are responsible for such attempts or acts, ~~and the confidential and exempt status of such information shall be retained while in the possession of the receiving agency.~~

(c) Portions of a comprehensive emergency management plan ~~that which~~ address the response of a public or private hospital to an act of terrorism include those portions addressing:

1. Security systems or plans;
2. Vulnerability analyses;
3. Emergency evacuation transportation;
4. Sheltering arrangements;
5. Postdisaster activities, including provisions for emergency power, communications, food, and water;
6. Postdisaster transportation;

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57        7. Supplies, including drug caches;  
 58        8. Staffing;  
 59        9. Emergency equipment; and  
 60        10. Individual identification of residents, transfer of  
 61 records, and methods of responding to family inquiries. ~~This~~  
 62 ~~subsection is subject to the Open Government Sunset Review Act~~  
 63 ~~of 1995 in accordance with s. 119.15 and shall stand repealed~~  
 64 ~~October 2, 2006, unless reviewed and saved from repeal through~~  
 65 ~~reenactment by the Legislature.~~

66        (2) Those portions of a comprehensive emergency management  
 67 plan that ~~which~~ address the response of a public hospital to an  
 68 act of terrorism as defined by s. 775.30 ~~and which are held by~~  
 69 ~~in the custody of~~ that public hospital are exempt from the  
 70 ~~requirements of~~ s. 119.07(1) and s. 24(a), Art. I of the State  
 71 Constitution. Portions of a comprehensive emergency management  
 72 plan that ~~which~~ address the response of a public hospital to an  
 73 act of terrorism include those portions addressing:

- 74        (a) Security systems or plans;
- 75        (b) Vulnerability analyses;
- 76        (c) Emergency evacuation transportation;
- 77        (d) Sheltering arrangements;
- 78        (e) Postdisaster activities, including provisions for  
 79 emergency power, communications, food, and water;
- 80        (f) Postdisaster transportation;
- 81        (g) Supplies, including drug caches;
- 82        (h) Staffing;
- 83        (i) Emergency equipment; and

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84        (j) Individual identification of residents, transfer of  
85 records, and methods of responding to family inquiries. ~~This~~  
86 ~~subsection is subject to the Open Government Sunset Review Act~~  
87 ~~of 1995 in accordance with s. 119.15 and shall stand repealed~~  
88 ~~October 2, 2006, unless reviewed and saved from repeal through~~  
89 ~~reenactment by the Legislature.~~

90        (3) The public records exemptions provided by this section  
91 are remedial in nature, and it is the intent of the Legislature  
92 that the exemptions apply to plans held by a custodial agency  
93 before, on, or after the effective date of this section.

94        (4) ~~That~~ Any portion of a public meeting which would  
95 reveal information contained in a comprehensive emergency  
96 management plan that ~~which~~ addresses the response of a hospital  
97 to an act of terrorism is exempt from ~~the provisions of s.~~  
98 ~~286.011 and s. 24(b), Art. I of the State Constitution. This~~  
99 ~~subsection is subject to the Open Government Sunset Review Act~~  
100 ~~of 1995 in accordance with s. 119.15 and shall stand repealed~~  
101 ~~October 2, 2006, unless reviewed and saved from repeal through~~  
102 ~~reenactment by the Legislature.~~



103        (5) ~~(4)~~ The certification by the Governor, in coordination  
104 with the Department of Health, of the sufficiency of a  
105 comprehensive emergency management plan that addresses the  
106 response of a hospital to an act of terrorism is not exempt.

107        Section 2. This act shall take effect October 1, 2006.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7023      PCB GO 06-11    OGSR Medical Facility Information  
**SPONSOR(S):** Governmental Operations Committee, Rivera  
**TIED BILLS:**                                 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Brazzell/Williamson	Williamson
1) Domestic Security Committee		Newton 	Newton 
2) State Administration Council			
3) _____			
4) _____			
5) _____			

## SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2<sup>nd</sup> of the fifth year after enactment.

The bill reenacts the public records exemption for information concerning the ability of a medical facility, storage facility, or laboratory to defend against an act of terrorism. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill may have a minimal non-recurring positive fiscal impact on state government. The bill does not appear to have a fiscal impact on local government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

Section 381.95, F.S., provides a public records exemption for certain information concerning medical facilities, storage facilities, and laboratories maintained by the Department of Health as part of the state's plan to defend against terrorism. Information specifically made exempt<sup>1</sup> includes information that identifies or describes the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities for certain individual medical facilities, storage facilities, or laboratories to defend against an act of terrorism. The exemption was enacted in the 2001 C special session following the September 11, 2001, attacks on the United States.

Pursuant to the Open Government Sunset Review Act,<sup>2</sup> the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

##### Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It makes editorial changes and reorganizes the section.

The bill removes the provision requiring an agency with authorized access to such information to maintain the exempt status of that information. In *Ragsdale v. State*,<sup>3</sup> the Supreme Court held that

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.<sup>4</sup>

In *City of Riviera Beach v. Barfield*,<sup>5</sup> the court stated "[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute."<sup>6</sup> As such, the provision is

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<sup>1</sup> There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record may not be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>2</sup> Section 119.15, F.S.

<sup>3</sup> 720 So.2d 203 (Fla. 1998).

<sup>4</sup> *Id.* at 206, 207.

<sup>5</sup> 642 So. 2d 1135 (Fla. 4<sup>th</sup> DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined "once a record is transferred from one public agency to another, the record loses its exempt status." The court declined to accept the Attorney General's view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

<sup>6</sup> *Id.* at 1137.

unnecessary and has been removed, because had the Legislature intended for the exempt status to evaporate then the Legislature would have stated as much.

**C. SECTION DIRECTORY:**

Section 1 amends s. 381.95, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an effective date of October 1, 2006.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

None. This bill does not create, modify, amend, or eliminate a state revenue source.

**2. Expenditures:**

The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment as a result of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None. This bill does not create, modify, amend, or eliminate a local revenue source.

**2. Expenditures:**

None. This bill does not create, modify, amend, or eliminate local expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

**Open Government Sunset Review Act**

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None.

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A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding medical facility terrorism response information; amending s. 381.95, F.S.; reorganizing provisions, making editorial changes, and removing superfluous language; removing the scheduled repeal of the exemption under the Open Government Sunset Review Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 381.95, Florida Statutes, is amended to read:

381.95 Medical facility information maintained for terrorism response purposes; confidentiality.--

(1) Any information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan to defend against an act of terrorism as defined in s. 775.30 is exempt from ~~the requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The certification by the Governor of the sufficiency of any location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of~~

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~~the state's plan to defend against an act of terrorism is a public record.~~ This exemption is remedial in nature, and it is the intent of the Legislature that this exemption apply be ~~applied~~ to information held ~~received~~ by the Department of Health before, on, or after the effective date of this section.

(2) Information made exempt by this section may be disclosed by the custodial agency to another state or federal agency in order to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those responsible for such attempts or acts, ~~and the exempt status of such information shall be retained while in the possession of the receiving agency. This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 and shall stand repealed October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(3) The certification by the Governor of the sufficiency of any location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan to defend against an act of terrorism is a public record.

Section 2. This act shall take effect October 1, 2006.